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No. 93-1410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNIVERSITY OF COLORADO, BOULDER, through its Board, THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate; JUDITH ALBINO, as President of the University of Colorado, Boulder; and WILLIAM MAROLT, as Athletic Director, Department of Intercollegiate Athletics,

Petitioners,

v.

DAVID DERDEYN, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether, based on the extensive trial record, the Colorado Supreme Court properly applied the clearly established principles of *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), when it held that the University's drug testing programs, which included random, suspicionless urine testing of student athletes, student trainers, managers and cheerleaders, violated the Fourth Amendment prohibition against unreasonable searches and seizures.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents David Derdeyn, *et al.*, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Colorado Supreme Court's decision in this case.

STATEMENT OF THE CASE

In this class action, participants in the University of Colorado's intercollegiate athletic program challenged four of the University's drug testing programs on federal and state constitutional grounds. After a week-long trial, the district court enjoined enforcement of the programs, declaring that searches and seizures thereunder violated both the Fourth Amendment of the United States Constitution and Article II, § 7, of the Colorado Constitution.

The University now asks this Court to review the general question of whether random, suspicionless drug testing of student athletes violates the Fourth Amendment. That general question, however, is not presented here. Instead, the Respondents challenged, and the Colorado courts struck down on both federal and state constitutional grounds, four specific University programs that required random, suspicionless drug testing, initially of student athletes, and later of student athletes, student trainers, managers and cheerleaders.

In striking down these programs, the Colorado courts relied on an extensive factual record and faithfully applied this Court's reasoning in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

There is no dispute about the legal principles that govern in this case. Rather, the University's objection is to the manner in which the Colorado courts applied those principles to the specific factual record compiled below. That factual dispute does not warrant this Court's plenary review. Any other conclusion would place this Court in the untenable position of reviewing every drug testing

decision issued around the country.

The University of Colorado's Drug Testing Programs.

The four different programs.

From 1984 to 1989, the University enforced four separate drug testing programs. Each shared some common elements. For example, all of the programs called for urine testing at the students' annual pre-season physical examination. (Exs. 5-8). Thereafter, the University compelled the students to submit to some form of random testing. Tests were designed to be truly random, so the same student could be, and in many cases was, called back numerous times during the season. (*See, e.g.*, Tr. 23-24, 70). To participate in the athletic program and qualify for accompanying financial assistance, all students had to sign a University form purporting to give "consent" to testing. (Exs. 5-8). In none of the programs did the University give general assurances of confidentiality. Pet. App. A at 4a-6a. Positive test results were announced to at least the Team Physician, the athlete, student trainer, manager, or cheerleader who was tested, the Athletic Director, the Head Trainer, and the student's coach, parents, and guardians.[1] (Ex. 5-8).

Under the first program the University randomly, and "regularly," drug tested approximately 10-15% of the covered students every week. (Ex. 5) (Tr. 211). Testing was not visually monitored. A first positive test resulted in counseling; a second, in one week's suspension; and a third, in a year's suspension and loss of athletic financial assistance. (Ex. 5). Positive test results might also be announced not only to those already described, but also to the student's spouse. (Ex. 5).

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[1] The University's programs also authorized testing students upon "reasonable suspicion" of drug usage, but those provisions are not in issue here. In any event, at trial the University's expert witness claimed that only random, suspicionless drug testing would meet the government's interests. (Tr. 779-785).

The second program implemented four basic changes. Students had to "disrobe" while providing the urine sample. Pet. App. A at 4a. Student trainers and athletic staff began directly observing the giving of urine samples. *Id.* (Tr. 228-229, 233) (Ex. 6). Penalties were stiffened so that a first positive test resulted in suspension for the balance of the competitive season, while a second positive meant permanent suspension and loss of all athletic financial aid. (Ex. 6). Finally, the laboratory drug detection standards were changed, helping to eliminate false positive test results. (*See* Tr. 218-220, 229-231, 324-325).

The third program again enhanced the penalty for a first positive test. Such a test would result in an immediate one-year suspension from athletics. Pet. App. A at 5a.

The final program, in effect from August, 1988 to the time of trial, differed significantly. It included the use of random, suspicionless rapid eye examinations (REE).[2] Students who failed any two parts of the REE were required to give a urine sample, which if positive led to a one-year suspension. A second positive urine test meant permanent suspension and loss of all athletic financial aid. (Ex. 8). "Work supervisors" were added to the list of individuals who might be notified of a student's positive test result. (*Id.*). Student trainers, managers and cheerleaders were specifically added to the definition of "athletes" subject to urine testing. (*Id.*).

The University performed thousands of REEs (Tr. 247), which the district court found to be completely untrustworthy. Pet. App. C at 95a. The evidence showed that an REE had "virtually no

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[2] This "test" had the trainer look into the student's eyes, measure pupil size with a cardboard "pupilometer," shine a penlight to observe pupil dilation; observe whether nystagmus (involuntary jerking of the eye) was occurring, and evaluate "convergence" (the ability to focus on an object as it was brought to within one inch of the student's face). Pet. App. C at 88a (Ex.14) (Tr. 39-41).

ability to measure drug use," since it was wrong 97% to 98.5% of the time. *Id.* at 88a-89a. Urine tests premised on REE results, as a practical matter, therefore, were random, and suspicionless. The district court held that REEs were unreasonable searches under the Fourth Amendment and the Colorado Constitution, *id.* at 100a, a decision the University did not appeal.[3]

Effect on student privacy interests.

The central part of each program was the random, suspicionless urine testing of students conducted by staff and student trainers. *See* Pet. App. C at 89a. Aside from the annual physical, tests were performed not by medical professionals, but by members of the athletic staff, including student trainers, who at times were assigned to visually monitor athletes, other student trainers, managers and cheerleaders submit their urine samples. During urine collection, "you have direct exposed genitals to the trainer and the trainer is looking at it." (Tr. 52; *see also* Tr. 26-27, 78, 125, 208, 233). The samples were collected in athletic training rooms and in bathrooms behind coaching offices. (Tr. 12, 71, 126) (*See* Ex. 8 at 7, requiring urine samples to be collected in "athletic" facilities). As one uncontradicted student testified, "The restroom was filthy in the training room. The one in Wardenburg [Student Health Center, where annual physical examinations might be done] was okay but the restroom in the training room was always filthy and you had to do it in front of somebody else and you had to do it in one day." (Tr. 71).

Student and staff trainers did, of course, provide sports-related care to the athletes. (*See, e.g.*, Tr. 37-38). That attention and care, however, was fundamentally different from the kind of attention paid to an athlete during the drug testing process. (*See, e.g.*, Tr.

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[3] The University asked the Colorado Supreme Court to evaluate its programs as if they did not use the REE. The court declined because the REE "was an integral part of the program," and the University "reserved a right to return to any of the drug-testing procedures that it used in its earlier programs." Pet. App. A at 13a n.15.

at 78: "Some female trainer had to be in the restroom watching you, in the actual stall watching you while you went to the bathroom."). The University's requirements that staff and student trainers monitor the students during urine testing perverted student-trainer relationships and made training staff seem hostile, not helpful to the athletes. Pet. App. A at 22a-23a n.21; *(see also, e.g.*, Tr. 84-86; *contrast with* Pet. at 3-4). There was ample evidence that the procedures offended the basic dignity, and the legitimate expectations of privacy, of the students tested.[4] At no time did the University submit evidence to show that student trainers, managers or cheerleaders in any way had lessened privacy expectations.

Mandated consents to drug testing.

Each student was required to sign a "consent" to testing or forego participation in the athletic program. (Exs. 5-8). Refusal to consent meant not only exclusion from the program, but also loss of accompanying financial aid on which students relied. (Ex. 5-8). Details of the consent forms and the specific testing

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[4] *See, e.g.*, Pet. App. A at 22a-23a nn.21-22:

> When I was treated by the athletic trainers, of course, they at various times touched various part (*sic*) of my body, that is necessary for treatment. At no time was I required to disrobe for this treatment or required to bear (*sic*) my genitals. Now, in the question of being observed giving a urine sample, you have direct, exposed genitals to the trainer and the trainer is looking at it and it's considered a private part of my body in my estimation.
>
> . . .
>
> When the trainers were treating me it was more like I was getting medical treatment and they were, say, some sort of medical personnel who were there to help me. In the instance of the drug testing, it was more like they were a policeman, more like an enforcement type situation and the atmosphere changed from friendly to adversarial.

(Tr. 52-53).

programs surprised students as they reported to the Athletic Department. (*See, e.g.*, Tr. 65). University witnesses testified that student athletes who were "recruited" were given advance notice of the drug testing programs. (*See, e.g.*, Tr. 183-184). The University, however, presented no evidence as to how many of the almost 450 students covered by the program in 1989 were recruited. (*See* Ex. 42).

Students, including those who were not recruited, learned about the program at their first team meeting, or in general discussions with coaches where the details were not specified. (Tr. 65-67, 119, 121-122). The University did not show that its procedures resulted in sufficient program information getting to transfer students, walk-ons, student trainers, managers or cheerleaders in advance of their first team meeting. (*See, e.g.*, Tr. 122-124). By that time students had already committed to attend the University and, as a practical matter, were precluded from going elsewhere. (*See, e.g.*, Tr. at 69). Based on these facts the Colorado Supreme Court affirmed the district court's finding that the University had not proven that consent to drug testing was voluntarily given. Pet. App. A at 40a-41a.

The University's drug testing programs within the context of intercollegiate sports.

The University inaccurately asserts that the privacy interests of the affected students are significantly lessened because of their involvement in private organizations like the NCAA, and the regulation of their personal habits within the intercollegiate sports program. (Pet. at 2-3). With respect to student athletes, the NCAA requires only participants in post-season competition to submit to random urine testing which the NCAA, not the University, conducts. (Tr. 50-51; Exs. 10 at 2, 13 at 5, 17 at 333-

335).[5] Furthermore, the University presented no evidence concerning the likelihood that any particular athlete would undergo NCAA testing.

The record does not show that athletes received "frequent" medical examinations. (*Compare* Tr. 49, 89, *with* Pet. at 3). Aside from one annual physical examination at the student health office, some athletes never saw a doctor, and rarely if ever used training services -- except when they were being drug tested. (*See* Tr. at 71). Many athletes did receive athletic training services, but these services were qualitatively different from students' experience during drug testing. (Tr. 78, 84-86).

Performing athletes in some instances might face curfews, study halls and training tables. (Pet. at 3). In practice, this happens only in two sports -- football and men's basketball. (Tr. 193-194). The record does not show that such restrictions affect the majority of student athletes, or any student trainers, managers or cheerleaders.

Finally, student trainers, managers and cheerleaders are not subject to NCAA drug testing. Nonetheless, the University classified those individuals as "athletes" for drug testing purposes. Pet. App. A at 24a nn.23-24; (Ex. 8 at 1). Nothing in the record shows that these students are ever required to take physical examinations or are subject to other personal regulation. Pet. App. A at 24a n.23.

The Decisions of the Colorado Courts.

The trial court.

The trial court made extensive factual findings and carefully analyzed those findings under *Skinner* and *Von Raab*. The court

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[5] Nothing in the record shows, and the University does not argue, that the Colorado Supreme Court's decision in any way interferes with the University's continued membership or participation in the NCAA or any other sports association.

commended the University for seeking to stop drug use and recognized many of the University's asserted interests. Yet, on balance the court held the University's random, suspicionless drug tests were unreasonable searches and seizures under the Fourth Amendment and Article II, § 7, of the Colorado Constitution. Pet. App. C at 90a-93a.

The University argued that even if its programs included otherwise unconstitutional searches and seizures, the programs were nevertheless permissible because the students had signed "consents" to be tested. *Id.* at 100a. The court acknowledged that "[a] person may give a voluntary consent to a search otherwise precluded by the requirements of the . . . Constitution." *Id.* at 101a. The court then considered the evidence to decide first, whether the consents were factually voluntary under *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and second, whether the consents were enforceable under the unconstitutional conditions doctrine of *Perry v. Sindermann*, 408 U.S. 593 (1972). *Id.* at 101a-102a.

The court concluded: "The evidence produced during this trial failed to establish that the consents given by the University's student-athletes are voluntary." *Id.* at 102a. That holding answered the factual question posed by *Schneckloth*. The court additionally reached the *Perry* question: "It is quite clear that they are 'coerced' for constitutional purposes by the fact that there can be no participation in athletics without a signed consent." *Id.*

The Colorado Court of Appeals.

The Colorado Court of Appeals generally affirmed, again applying the balancing test of *Skinner* and *Von Raab* and concluding the searches were unreasonable under the federal and state constitution. Pet. App. B. The court did not reach the question of whether the programs created an unconstitutional condition. Rather, it affirmed on evidentiary grounds. *Id.* at 82a.

The Colorado Supreme Court.

The Colorado Supreme Court also applied the balancing test of *Skinner* and *Von Raab* to the facts, and affirmed the lower courts' conclusion that the programs violated both the Fourth Amendment and Article II, § 7, of the Colorado Constitution. It thoroughly considered the same fact-based arguments the University restates here. Pet. App. A at 15a-34a. The court closely examined the degree to which the University's programs intrude on students' privacy, *Id.* at 16a-28a, evaluated the significance of the University's interests in enforcing the programs, comparing those interests to those in more than a dozen cases in the area, *id.* at 29a-33a, and held that "the great majority of cases following *Skinner* and *Von Raab* clearly militate against the conclusion that CU's [the University of Colorado's] program is a reasonable exercise of state power under the Fourth Amendment." *Id.* at 33a (footnote omitted).

Turning to the University's consent defense, the court held that *Schneckloth* was the controlling precedent. *Id.* at 34a-35a. The court held that testimony from Respondents' witnesses, and the lack of evidence offered by the University, supported the trial court finding that -- regardless of what the University said its policy was -- it did not meet its burden of proof. *Id.* at 35a-36a & n.31. The University failed to show that: (1) adequate advance notice of testing was given; (2) students were offered sufficient time to apply to other colleges if they objected to the University's program; (3) students were adequately advised that former drug testing procedures could be used. *Id.* at 40a-41a.

These evidentiary failures were separate from the fact that students were also coerced into signing consent forms since they could neither participate nor receive needed financial aid unless they agreed to the testing. *Id.* Having concluded that the consents secured under the University's programs were not voluntary, the court found that it would be both unnecessary and improper to reach the unconstitutional conditions question. *Id.* at 41a n.36.

REASONS FOR DENYING THE WRIT

I.

THE COLORADO SUPREME COURT PROPERLY DECIDED THIS CASE, APPLYING THE NOW WELL-ESTABLISHED GOVERNING FOURTH AMENDMENT PRINCIPLES FROM THIS COURT'S PRECEDENTS TO THE EXTENSIVE FACTUAL RECORD CONCERNING THE UNIVERSITY'S RANDOM, SUSPICIONLESS DRUG TESTING PROGRAMS.

The Colorado Supreme Court meticulously applied the reasonableness balancing test this Court established in *Skinner* and *Von Raab*. The Colorado Supreme Court's conclusion that, on this record, the University's drug testing program violates the Fourth Amendment is consistent with a wide range of post-*Skinner* and *Von Raab* decisions. These decisions have applied *Skinner* and *Von Raab* to specific fact situations, in some instances approving random drug testing, while striking it down in others. Results have differed from agency to agency, and from one class of employee to another, depending on the facts, even when programs might appear similar on their face. *See, e.g., National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) (Army air traffic control employees may be randomly drug tested, while laboratory workers may not); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) (Department of Justice employees with top secret security clearances subject to random urinalysis, but government interest in public safety and the integrity of work force does not justify testing all classified document clerks and prosecutors); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (random testing for correctional officers in contact with prisoners allowed, but not allowed for all jail staff); *American Fed'n of Gov't Employees, Local 1616 v. Thornburgh*, 798 F. Supp. 597 (N.D. Cal. 1991) (Immigration and Naturalization Service may randomly drug test employees with access to security sensitive material but not all

workers); *National Treasury Employees Union v. Watkins*, 722 F. Supp. 766 (D.D.C. 1989) (Department of Energy employees in "sensitive" positions may be randomly tested, but not those who drive motor vehicles and operate computers).[6]

In *Skinner* and *Von Raab* this Court held that government-compelled collection and chemical analysis of urine samples are searches governed by the Fourth Amendment because they intrude upon reasonable expectations of privacy. *Skinner*, 489 U.S. at 617. Warrants and probable cause are presumptively necessary to justify most government searches, but may not always be constitutionally required where "special needs" beyond the normal need for law enforcement are served. *Id.* at 619-21. Moreover, the ordinary requirement for some quantum of individualized suspicion may be excused in "*limited circumstances*, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Id.* at 624 (emphasis added). The reasonableness of a government search in special needs cases is measured by balancing the extent of the privacy interests adversely affected by the search against the corresponding government interests. *Von Raab*, 489 U.S. at 668.

There is no dispute in this case concerning these well established

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[6] These cases illustrate that it is inappropriate under *Skinner* and *Von Raab* to decide the constitutionality of the University's urine testing programs for athletes, student trainers, managers and cheerleaders as if the government's interests with respect to each of those classes is uniform. Notably, the University placed into the record virtually nothing supporting a government interest in randomly testing student trainers, managers or cheerleaders. Aside from once acknowledging that these different classes of students were subject to testing (Pet. at 2), the University never discusses these students' privacy interests or the constitutionality of the University's programs, as applied to them. *See* Pet. App. A at 24a nn.23-24.

legal guidelines. Even the dissenting justices below recognized that this case involves "settled principles of constitutional adjudication." Pet. App. A at 59a (Erickson, J., dissenting).

The University attempts to create a conflict where none exists. Its portrayal of the Colorado Supreme Court's decision as aberrational simply does not comport with the reality of post-*Skinner* and *Von Raab* decisions. What predictably has occurred in the last five years is the inevitably fact-based application of the relevant legal standards by lower courts to particular programs. *See, supra, at 10-11.* That there are different results arising from the application of those standards to the various forms of urine testing programs should surprise no one. That is the natural consequence of this Court's creation of a standard subject to application in a broad variety of factual circumstances.

It is apparent that the University seeks this Court's review not because of any dispute over the guiding legal principles, but merely because it is unhappy with the Colorado Supreme Court's *application* of those well-established standards. This Court's defining opinions in *Skinner* and *Von Raab* clearly anticipated that future applications of this reasonableness balancing test under the Fourth Amendment were likely to be narrowly fact-based. *Skinner*, 489 U.S. at 619 ("what is reasonable . . . 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself'"); *Von Raab*, 489 U.S. at 678 (remanding for specific factual determination on whether classification of employees with access to "sensitive information" was accurately determined).

Furthermore, the factual complications of this case prevent it from being a vehicle for the articulation of useful general principles to guide the lower courts. During the course of this litigation, the University's urine testing program took on four

different formats. Each was in issue at trial.[7]

Some of the modifications undertaken when the University altered its programs have a direct bearing on the reasonableness determination derived from *Skinner* and *Von Raab*. For example, under the second program, students were required to produce their urine samples under the direct visual observation of student trainers and athletic staff. (Tr. 233). The Colorado courts relied, in part, on the extensive testimony about the humiliating intrusion occasioned by this procedure. Pet. App. A at 4a-5a & n.8. In contrast, the fourth program permitted students to provide their specimens in a "private and enclosed area" with aural, rather than visual, monitoring. *Id.* at 6a; *but see Skinner*, 489 U.S. at 617 (collection of urine samples involving visual or aural monitoring of urination implicates privacy interests protected by Fourth Amendment). The Colorado Supreme Court carefully sifted through many pertinent details such as these in concluding that the University's programs are unconstitutional.

Even if this Court were to grant review, it is unlikely that additional guidance could be provided beyond the detailed analytical framework already laid out in *Skinner* and *Von Raab*. The reasonableness determination under the special needs exception to the warrant and probable cause requirements under the Fourth Amendment would necessarily, and properly, remain fact-bound.

It is not consistent with this Court's practice to classify cases, as the University attempts (Pet. 11-12), as "athlete" cases or "public employee" cases. *Skinner* and *Von Raab* make it clear that such broad generalizations are neither useful nor appropriate. Those decisions leave ample room for results in urine testing cases

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[7] The University refused to agree not to return to any of the previous versions, including the one authorizing visual monitoring of urine collection. Pet. App. A at 7a-8a. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (voluntary cessation of illegal conduct does not render a case moot).

tailored to the particular details of a search conducted to serve specific government interests. Context is critical.

Even accepting the University's narrow characterization of this case, the Colorado Supreme Court's decision is not in conflict with authority from other courts. There is only one reported decision specifically addressing the federal constitutionality of a drug testing program in the intercollegiate athletic context. *See O'Halloran v. University of Wash.*, 679 F. Supp. 997 (W.D. Wash. 1988), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988). As the Colorado Supreme Court recognized, the district court opinion in *O'Halloran* is of extremely limited usefulness because it was rendered in the absence of subject matter jurisdiction, was decided prior to *Skinner* and *Von Raab*, and relies primarily on the absence of state action to resolve the constitutional issue. Pet. App. A at 29a-30a & n.29.

Other cases on which the University relies to manufacture a conflict concerned athletic testing in the vastly different context of professional horse racing, where there were more demonstrable safety interests and where legalized gambling heightened integrity concerns related to the public fisc. *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (en banc) (danger to self and others and state fiscal interests); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986) (integrity interests in professional sport). *Compare* Pet. App. A at 29a n.28 (observing that the University has not asserted any financial interest to justify the reasonableness of its urine testing programs).

Moreover, two of the other cases address the constitutionality of testing minors in middle or high school, where the state's interests may be magnified due to the youth of the persons subject to testing. *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) (pre-*Skinner* and *Von Raab*); *Acton v. Vernonia School Dist. 47J*, 796 F. Supp. 1354, 1363 (D. Or. 1992) (specifically distinguishing itself from this case). *See* Pet. App. A at 18a: "[I]t cannot be said that university students, simply because they are university students, are entitled to less protection than other persons under the Fourth Amendment." (Citation omitted).

Cf. Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd mem.*, 930 F.2d 915 (5th Cir. 1991) (invalidating random urine testing of high school students involved in all extracurricular activities); *Anable v. Ford*, 653 F. Supp. 22, *modified in part* 663 F. Supp 149 (W.D. Ark. 1985) (urinalysis of students unconstitutional given insufficient evidence to justify intrusive procedures).

Finally, the University points to a single state court decision that relies solely on state constitutional law principles. *See Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994). To the extent there is any conflict concerning the appropriate legal standard regarding suspicionless urine testing of professional, collegiate, or high school athletes in particular, it is one that reflects the application of different *state* constitutional principles. *Compare, Hill*, 7 Cal.4th at 48-49, 865 P.2d at 663, 26 Cal.Rptr.2d at 865 (random urine testing of college athletes by private organization does not violate state constitution) *with, Horsemen's Benevolent and Protective Ass'n v. State Racing Comm'n*, 403 Mass. 692, 532 N.E.2d 644 (1989) (random urine testing of state-licensed jockeys violates Massachusetts Constitution).[8]

The University's petition is premised on a misunderstanding of

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[8] At several points in its opinion, the Colorado Supreme Court explicitly held that the University's urine testing programs also violated Art. II, §7 of the Colorado Constitution. Pet. App. 12a, 34a, 41a. While the court did not specifically rely on the state constitution as an adequate and independent state ground within the meaning of this Court's holding in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), the Colorado courts uniformly concluded that the University's suspicionless urine testing violated the Colorado Constitution. *See* Pet. App. B at 81a (Colorado Court of Appeals); Pet. App. C at 96a-100a (trial court noting that Colorado Constitution does not recognize "special needs" exception to warrant and probable cause requirements). Thus, while this Court is not formally deprived of jurisdiction, a subsequent resolution of this case on state constitutional grounds is surely more than a remote possibility.

the application of clear legal principles to a wide variety of factual situations. This case simply does not warrant review for the purpose of reexamining that application to an extensive trial record.

II.

ON THE SPECIFIC FACTS DEVELOPED AT TRIAL, ALL FOUR VERSIONS OF THE UNIVERSITY'S PROGRAMS COMPELLING RANDOM, SUSPICIONLESS URINE TESTING OF STUDENT ATHLETES, STUDENT TRAINERS, MANAGERS AND CHEERLEADERS CONSTITUTE UNREASONABLE SEARCHES IN VIOLATION OF THE FOURTH AMENDMENT.

In its decision, the Colorado Supreme Court correctly balanced the competing interests as described in *Skinner* and *Von Raab*. The court set forth its methodology as follows:

> We must . . . balance individual student athletes' privacy expectations against CU's governmental interests to determine whether CU's random, warrantless, suspicionless urinalysis-drug-testing program is unreasonable under the Fourth Amendment.

Pet. App. A at 14a-15a, citing *Skinner*, with its reference to *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), *Delaware v. Prouse*, 440 U.S. 648 (1979), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

Student privacy expectations.

This Court has acknowledged that privacy concerns attendant to collection of urine samples are not minimal in "most contexts." *Skinner*, 489 U.S. at 626. Guided by *Skinner* and *Von Raab*, the Colorado Supreme Court carefully measured the contextual factors this Court has deemed relevant in evaluating the intrusiveness of the University's urinalysis programs. It found that the University's

programs share many of the attributes commonly identified in other post-*Skinner* and *Von Raab* cases as exacerbating the privacy intrusion visited upon persons subject to suspicionless urine testing. Unlike the railway employees in *Skinner* or the elite Customs Service agents in *Von Raab*, the college students subject to testing under the University's program did not have significantly diminished privacy expectations, particularly in light of the intrusive nature of the urine collection procedures.

The University required student trainers to directly observe athletes, other student trainers, managers and cheerleaders in the act of urination. (Tr. 233). While the court also found that aural monitoring of urination was significantly intrusive, Pet. App. A at 21a & n.20, this Court has recognized the heightened privacy intrusion resulting from direct visual monitoring. *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 672-673 n.2 (procedures minimize intrusion because there is no direct observation).

Moreover, the urine samples here are collected in a context far from the professional surroundings of a physician's office or hospital. *Cf. Skinner*, 489 U.S. at 626-27 (privacy concerns diminished by medical environment of testing). Instead, students were forced to submit urine in a locker room or in a bathroom behind a coach's administrative office in front of their peers. *See* Pet. App. A at 20a-23a & nn.20-22.

Student athletes surely may be subject to some University regulation. Given the testimony, however, the Colorado Supreme Court questioned the University's assertion that affected students were "extensively regulated," pointing out that only athletes in some sports were subject to certain rules. *Id.* at 23a-24a; *see, e.g.*, Tr. 193. The court noted there was no evidence that student trainers, managers and cheerleaders were regulated in any way. *Id.* at 24a & n.23.

The University's interests.

The Colorado Supreme Court held that the interests advanced by

the University were not sufficient to outweigh the legitimate privacy expectations of the athletes, student trainers, managers and cheerleaders. In light of the comparatively weighty governmental interests that have been found to justify suspicionless urine testing in more serious contexts, the court questioned whether some of the University's asserted interests were even significant. *Id.* at 33a. *Contrast with Skinner*, 489 U.S. at 628 (critical need to protect against known risks of injury to others) *and Von Raab*, 489 U.S. at 674 ("extraordinary safety and national security hazards").

The University contends that it has overriding interests in: (1) preparing its athletes for (private) NCAA competition; (2) promoting integrity in its athletic programs; (3) preventing other students not subject to testing from using illegal drugs, by ensuring that athletes, student trainers, managers and cheerleaders, are "role models;" (4) promoting fair competition in athletics; and (5) promoting the health and safety of the students who are required to provide urine samples.[9]

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[9] The University has generally labelled the government interest in its drug testing programs as "extremely important." (Pet. at 19). It has singled out different aspects as being "compelling" or "clearly compelling" (athlete health and safety, *id.* at 19-21; education, *id.* at 20), "strong" (fair competition, *id.* at 19-20), "especially compelling" (deterring use of steroids, *id.* at 20, which the University inaccurately states were shown to be used at the University), and "unquestionably . . . important" (deterring general drug use, *id.* at 20).

The University quibbles with the Colorado Supreme Court because it concluded that the University's interest in protecting the health and safety of its athletes was "unquestionably significant," instead of "compelling." (Pet. at 21). The Colorado Supreme Court rejected such formulaic designations in favor of the sensitive balancing required by *Skinner* and *Von Raab*:

> "[R]ather than trying to characterize CU's interests as "compelling," "strong," "substantial," or of some lesser degree of importance, we think it is more instructive simply to compare them with other types of commonly asserted interests that have been held sufficient or

(continued...)

None of these interests, together or alone, is comparable to the type of broad, public safety concerns or other governmental interests asserted in *Skinner* or *Von Raab*. As the Colorado Supreme Court properly observed, it is unclear why the University has a weighty *governmental* interest in preventing its athletes from being disqualified at NCAA sponsored events or in promoting fair competition. Pet. App. A at 33a-34a. The court similarly rejected the "role model" interest as both too speculative and attenuated to constitute an adequate justification for intrusive suspicionless urine testing. *Id.* at 33a & n.30; *accord* Taylor, 888 F.2d at 1196 (rejecting generalized integrity interest).

The only interest that seriously could be considered meaningful in this context would be the University's promotion of the health and safety of student athletes, an interest that admittedly does not pertain to cheerleaders, trainers, or managers. Yet it is noteworthy that the University identified virtually no drug use among its student athletes and produced no evidence of any harm to the health or safety of athletes resulting from drug use. (Tr. 197-198).[10] The government may not always be precluded from establishing a drug testing program simply because there is no demonstrable drug-related safety problem. *Von Raab*, 489 U.S. at 674. Nevertheless the absence of such difficulties is still a factor to be weighed in assessing the significance of the government's

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[9](...continued)
insufficient to justify similar intrusions."
Pet. App. A at 31a.

[10] During the first two years of the University's program detection levels were improperly set, *e.g.*, for cannabinoids 20-25 nanograms per milliliter, probably accounting for false positives. (*See* Tr. 218-220, 324-325). At the end of the second year of testing the University brought the standards to within accepted norms (positives reported only above 50 nanograms) and the positive test results all but disappeared. (*See* Tr. 324; Ex. 42).

asserted interests.[11] *See Brooks*, 730 F. Supp. at 761 (high school extracurricular activities drug testing program stricken where little evidence that drug use constituted a real problem).

In light of the extensive factual record demonstrating the strong privacy expectations of the students -- given the specifics of how the programs worked, the limited nature of the government interests in the context of college sports, and the broad class of students covered -- the Colorado Supreme Court's decision was fully justified as an application of the Fourth Amendment reasonableness test.[12]

III.

THE COLORADO SUPREME COURT PROPERLY RELIED UPON THE TRIAL COURT'S FACTUAL CONCLUSION THAT THE EVIDENCE ESTABLISHED THE INVOLUNTARY NATURE OF "CONSENT" EXACTED FROM STUDENTS UNDER THE UNIVERSITY'S DRUG TESTING PROGRAMS.

After carefully reviewing the ample trial record, the Colorado Supreme Court agreed that the University had not met its burden

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[11] The University relies in part on anecdotal evidence of highly publicized, isolated incidents involving the death of persons who were famous athletes. To suggest that significant privacy intrusions can be justified on so slim a demonstration of even remotely possible harm is to engage in "a kind of immolation of privacy and human dignity in *symbolic* opposition to drug use." *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting) (emphasis added).

[12] Academic commentary on this issue is by no means uniform. *See, e.g.*, LeRoy Pernell, *Random Drug Testing of Student Athletes by State Universities in the Wake of Von Raab and Skinner*, 1 MARQ. SPORTS L.J. 41, 84 (1990); Stephen F. Brock & Kevin M. McKenna, *Drug Testing in Sports*, 92 DICK. L. REV. 505 (1988). The University's implication otherwise, (Pet. at 14 n.4), is misleading.

of demonstrating that students' consents to urine testing were voluntary. Pet. App. A at 41a. In so doing, the court emphasized that the trial court's factual findings on consent must be affirmed unless they were clearly erroneous. *Id.* at 35a. That decision was consistent with this Court's admonition that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227.[13]

The court appropriately viewed the consent issue as involving a factual dispute. Its conclusion was reliably based on evidence that -- generally speaking -- the University provided insufficient notice about the programs.[14] Consent to testing was exacted after students already had made financial and other commitments to the attend the University and participate in its athletic programs. Pet. App. A at 40a; (Tr. 65-67, 69, 119, 121-122). Accordingly, the consent forms signed by the students under the University's program were not "intelligently and freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision." Pet. App. A at 34a (quoting *People v. Carlson*, 677 F.2d 310, 318 (Colo. 1984) citing [*Schneckloth v.*] *Bustamonte*).

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[13] In its opening brief before the Colorado Supreme Court the University argued that it had met the requirements of *Schneckloth*, and the students' consents were factually voluntary. In its reply brief the school changed its position and argued that only the question of unconstitutional conditions was at issue. The Colorado Supreme Court noted this logical inconsistency. Pet. App. A at 36a n.33.

[14] At trial the University attempted to show that adequate detailed notice was given to "recruited" students. Yet the school offered no testimony as to how many of the students in the programs fell into that class. (*See, e.g.*, Tr. 183-185). For those many athletes, student trainers, managers and cheerleaders not recruited, information was sketchy (Tr. 119) or non-existent until the athlete appeared at the beginning of the school year to sign the consent form. (*See, e.g.*,Tr. 65-67).

Properly viewed, the Colorado Supreme Court's holding addresses only the matter of consent as a defense to an otherwise unreasonable search. As explained by that court, the fact that this case was a class action simply meant that it had to address whether the systemic exaction of consent, under the "procedures routinely followed in the implementation of the drug-testing program, as applied to student athletes typified by those who testified at trial" was voluntary. Pet. App. A at 40a. It concluded that they were not.[15] Persons subject to testing could not be considered to have voluntarily agreed to testing when subject to untoward coercion. *See, e.g., American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 736 (S.D. Ga. 1986)(concluding that named plaintiffs in class action suit did not voluntarily give consent); *Bostic v. McClendon*, 650 F. Supp. 245, 249 (N.D. Ga. 1986).

The Colorado Supreme Court refused to address the University's contention that this approach was analytically inconsistent with the doctrine of unconstitutional conditions, on which the trial court was held to have relied only as an alternative holding. Pet. App. A at 36a. While the University might wish that the Colorado Supreme Court had decided the consent issue under unconstitutional conditions analysis, based on the evidence it did not. In fact, given the record, for the Colorado courts to have decided the consent issue as anything other than a factual dispute would have been grave error.[16] *Id.* at 41a-42a n.36.

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[15] This conclusion does not, however, foreclose the possibility that an individual student, given appropriate notice and opportunity, might in some circumstances voluntarily consent to such testing. In fact, for the last five years the University has publicly been reported to have been operating a truly voluntary drug testing program which is not the subject of this litigation.

[16] In refusing to reach the unconstitutional conditions question the Colorado Supreme Court repeated a basic premise:

> "'[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is

(continued...)

The University has presented no clear reason why the consent issue is worthy of this Court's review. As with its contention concerning the underlying Fourth Amendment issues, the University's argument is premised on the argument that the Colorado Supreme Court misapplied well-established doctrine, a doctrine this Court has recognized as inherently fact-based. *Schneckloth*, 412 U.S. at 227.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[16](...continued)
that we out not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'"
Pet. App. A at 41a n.36 quoting *Jean v. Nelson*, 472 U.S. 846, 854 (1985), and *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944).